

11-17-08

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Attorney Docket 01051

(Case No. 03-908)

In application of )  
 )  
James C. Bishop, *et al.* )  
 )  
Serial No. 10/695,517 )  
Patent No. 7,429,355 )  
 )  
Filed: October 28, 2003 )  
Issue Date: September 30, 2008 )  
 )  
For: Sealer for Test Sample Devices )

TRANSMITTAL LETTER

Mail Stop Patent Ext.  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

In regard to the above-identified patent application:

1. We are transmitting herewith the attached:
  - A. Request for Reconsideration of Patent Term Adjustment Under 37 C.F.R. 1.705(b)-(d)
  - B. Check in the amount of \$200.00
  - C. Return Postcard
2. With respect to additional fees:
  - A. ☐ No additional fee is required.
  - B. ☒ Attached is a check in the amount of \$200.00.
  - C. ☐ Charge the total additional fee to our Deposit Account No. 13-2490.
3. Please charge any additional fees or credit overpayments to the Deposit Account No. 13-2490. A duplicate copy of this sheet is enclosed.
4. **CERTIFICATE UNDER 37 CFR 1.10 (EXPRESS MAIL):** The undersigned hereby certifies that this Transmittal Letter and the document(s) as described in paragraph 1 hereinabove, are being deposited with the United States Postal Service with sufficient postage as Express Mail, Mailing Number EB846852718US, in an enveloped addressed to: Mail Stop Patent Ext., Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 13<sup>th</sup> day of November 2008.

By:

Thomas A. Fairhall

Reg. No. 34591



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PATENT

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**REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT**  
**UNDER 37 C.F.R. 1.705 (b)-(d)**

Sir:

Responsive to the Determination of Patent Term Adjustment posted on the Patent Application Information Retrieval System (PAIR) as of the September 30, 2008 issue date of U.S. Patent No. 7,429,355 and in light of the recent ruling in *Wyeth v. Dudas*, No. 07-1492, slip op. (D.D.C. Sept. 30, 2008) the Patentees submit this Request for Reconsideration of Patent Term Adjustment under 37 C.F.R. 1.705(b)-(d).

Terminal Disclaimer

The '355 patent is not subject to a terminal disclaimer.

Fee

A check in the amount of \$ 200 is enclosed for payment of the required fee for consideration of this request. Please charge any additional required fees or credit any

overpayment to deposit account no. 13-2490.

The '355 patent issued on September 30, 2008. This request is being submitted within two months of the issue date of the '355 patent, and complies with the deadline specified in 37 C.F.R. 1.705(d). In addition, given the recent ruling in *Wyeth*, which was decided on September 30, 2008 (coincidentally also the issue date), the Patentee could not have raised this issue prior to payment of the issue fee. Thus, Patentees contend this request is timely.

The data available on PAIR indicates that the '355 patent has been granted a 892 day Patent Term Adjustment. Patentees submit that, due to the recent *Wyeth* decision, the correct Patent Term Adjustment should be 1,361 days. **Patentee, therefore, requests that the '355 patent be granted an additional 469 days of patent term.**

Statement of facts and explanation of calculation

For purposes of this request and in keeping with the explanation provided in *Wyeth*, Patentees will refer to as the "A delay" as examination delay under 37 C.F.R. 1.703 (a). In the "A delay" the Patent Office delayed prosecution by issuing the first communication on 6/28/2007. The period of delay commenced on 12/28/2004, 14 months after the application filing date. The applicants calculate the period of A delay as beginning as 12/28/2004 and ending on 10/28/2006, the three year anniversary of the filing of the application and the commencement of the "B" delay. Applicants are not counting the overlap in the period of delay from 10/28/2006 until 6/18/2007. **This period of PTO "A" delay is from 12/28/2004 until 10/28/2006, which is 3 + 365 + 301 or 669 days.**

Delay due to applicant consists of 6 days in responding to the 10/4/07 office action on 1/10/2008 and 4 days in submitting the amendment after allowance on 8/22/08 after payment of issue fees. **The total applicant delay is thus 10 days.**

The Patent Office delayed issuance of the patent by more than three years, and the

period of "B delay" commences on 10/28/2006 (three year anniversary of the filing date) and ends on the issuance of the patent on 9/30/2008. The applicant's delay in this period is accounted for above (10 days). The patentee is not double counting in this period the overlap between the three year or "B" delay period and the "A" delay (i.e., the period between 10/28/2006 and the 6/28/2007 mailing date of the restriction requirement). **This period of "B" delay is 702 days by applicant's calculation** (delay of 64 days during 2006 + delay of 365 days in 2007 + delay of 273 days in 2008).

Therefore, the Patent Office was responsible for a total of 702 + 669 days of delay and the applicant is responsible for 10 days of delay.  $702 + 669 - 10 = 1,361$ , which is the proper patent term adjustment under *Wyeth*. The patent adjustment term as stated on the patent is 892 days which is deficient by 469 days ( $892 + 469 = 1361$ )

In light of the foregoing, the Patentees respectfully request that an additional 469 days of Patent Term Adjustment be added to the patent term for Patent Office delay, resulting in a total Patent Term Adjustment of 1,361 days. If a telephone conference would expedite the prosecution of this Request for Reconsideration of Patent Term Adjustment, please contact the undersigned attorney as indicated below.

Respectfully submitted,

**McDonnell Boehnen Hulbert & Berghoff LLP**

Date: November 13, 2008



Thomas A. Fairhall  
Reg. No. 34591  
Ph. 360 379 6514